

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss

SUPERIOR COURT
IND. NO. 1995-CR-46579Superior Court
Barnstable, ss

Filed JUN 27 2018

Clerk

COMMONWEALTH)	
)	COMMONWEALTH'S MOTION TO
v)	RECONSIDER DISCOVERY ORDER
)	TO DISCLOSE OCME PERSONNEL
EMORY SNELL)	FILE

Now comes the Commonwealth, through its District Attorney Michael D. O'Keefe, and respectfully opposes the defendant's motion for enlargement of the 2005 discovery order. As reasons therefore the Commonwealth states that this request seeks information outside the custody and control of the Commonwealth and involves potentially privileged information that was not a part of the original trial. In addition: (1) the defendant has not submitted an affidavit as required by the Mass.R.Crim.P. 30(c) (as appearing 435 Mass. 1501 (2001)); (2) has not served the Office of the Chief Medical Examiner ("OCME") when it seeks records from OCME; (3) has not made a prima facie case for relief as required by Mass.R.Crim.P. 30(c); and (4) by not making this claim at the earliest possible time, the defendant has waived presentation of this issue. The defendant is engaged in a fishing expedition to seek

support for allegations made by a now-deceased potential expert witness.

STATEMENT OF PRIOR PROCEEDINGS

1. The defendant Emory Snell, Jr. was indicted on April 19, 1995 for the first-degree murder of his wife, Elizabeth Lee. A jury trial was held in Barnstable Superior Court from August 21, 1995 - September 1, 1995 (Travers, J.). The defendant was convicted of first-degree murder (by deliberate premeditation) on September 1, 1995.

2. In November, 1996, the defendant's direct appeal was stayed in order for him to pursue a motion for a new trial. The defendant filed his motion in the trial court in October, 1997. In February, 1998, the defendant's motion for a new trial was denied without a hearing (Travers, J.). A motion to reconsider the denial of the motion for a new trial was also denied without a hearing (Travers, J.). The appeal of the denial of the motion for a new trial was consolidated with the direct appeal.

3. The defendant's conviction was affirmed by the Supreme Judicial Court on February 2, 1999. *Commonwealth v. Snell*, 428 Mass. 766 (1999) (Greaney, J.).

4. On December 20, 1999, the defendant filed a pro se Motion for Release From Unlawful Confinement Rule 30(a) or, Alternatively, New Trial Rule 30(b). This second motion was

denied March 16, 2000 (Connon, J.). The defendant filed a Notice of Appeal on March 21, 2000

5. The defendant filed his Motion for Leave to Be Heard on Timely Filed Appeal from Denial of Rule 30(a) &(b) New Trial Motion on October 5, 2001. This appeal of the denial of his motion for a new trial was denied by a Single Justice of the Supreme Judicial Court on July 26, 2002 (Spina, J.)

6. On August 29, 2011, the defendant filed a motion for expert funds to retain an expert pathologist and a meteorologist. The defendant filed a renewed Motion to Permit Funds for Forensic Experts on September 16, 2011. This renewed motion was denied without prejudice, to renew, following expected filing of Rule 30 Motion on February 10, 2012.

7. On September 14, 2012, the defendant filed his Motion for Enlargement of 2005 Discovery Order to Include Personnel File.

8. The Commonwealth filed an opposition to the defendant's motion for discovery.

9. The defendant filed a motion for a new trial in December of 2017. The Commonwealth filed an opposition to the defendant's motion.

10. On June 12, 2018, Muse, J., heard the defendant's motion for a new trial for "status," and did not give the Commonwealth notice that the motion was marked up for hearing.

ARGUMENT

THE DEFENDANT HAS NOT MET HIS BURDEN OF ESTABLISHING A PRIMA FACIE CASE THAT WOULD ENTITLE HIM TO POST-CONVICTION DISCOVERY.

A. Standard of Review

Discovery in the context of a new trial motion under rule 30(c)(4) is not a matter of right. *Commonwealth v. Arriaga*, 438 Mass. 556, 570 (2003). The purpose of post-conviction discovery is to allow a defendant to gather evidence to support an apparently meritorious claim where the evidence that can be adduced to support the claim is unknown to the court. *Commonwealth v. Daniels*, 445 Mass. 392, 406 (2005) (further citation omitted).

In this case, the defendant is not looking for evidence to support a claim, he is seeking to conduct a fishing expedition and go through a third party's personnel records in order to manufacture a claim now that his expert witness has died.

B. The defendant has not met his burden of establishing that he has a prima facie case, which is required in order to obtain postconviction discovery.

The motion and affidavits must establish a prima facie case before discovery is available. *Arriaga, supra* at 569. The report by now-deceased Dr. Stanton Kessler brings nothing before this court to support the defendant's burden of proving that he has a prima facie case to warrant discovery. Kessler is deceased. If an evidentiary hearing were to be held on the defendant's motion for discovery, the defendant can bring nothing to support his allegations to the Court.

A defendant cannot use a motion for post-conviction discovery to engage in a "fishing expedition." See generally, E.B. Cypher, *Criminal Practice and Procedure*, §42. The defendant's motion and request for discovery of the personnel file is clearly a fishing expedition, where the defendant's request is based upon newspaper articles and an unsigned affidavit from a deceased supervisor.

The defendant in his motion acknowledges that Kessler's death forms the basis for his request to search through Dr. Zane's personnel records. Discovery in this case is not sought to support a prima facie case, but is sought to construct a claim in order to try to create a new cause of issue. There has been no showing by the defendant that discovery is reasonably likely to uncover evidence

that might warrant granting a new trial. *Daniels, supra* at 406.

The case of *Commonwealth v. Wanis*, 426 Mass. 639 (1998), cited by the defendant, is not applicable to the situation presented here. In *Wanis*, the defendant was seeking pre-trial access to internal affairs police reports that contained statements by eyewitnesses. *Wanis, supra* at 640. That discovery request was made pursuant to pre-trial discovery rule Mass.R.Crim.P. 14(a)(1), not post-trial discovery rule 30(c)(4).

Kessler's report is not in the form of an affidavit or attested to in any fashion. It was not prepared with sufficient indicia of reliability or other corroborating circumstances to raise a substantial issue warranting a hearing or an order of discovery. Nor does it contain sufficient credible evidence to cast doubt upon the issue. See *Daniels, supra* at 407, also citing *Commonwealth v. Goodreau*, 442 Mass. 341, 348 (2004) (citation omitted). It contains multiple layers of hearsay, none of which are independently admissible. See *Commonwealth v. Caillot*, 449 Mass. 712, 721 (2007), citing *Commonwealth v. McDonough*, 400 Mass. 639, 643 n.8 (1987). The Commonwealth will be unable to challenge this hearsay report by a deceased person.

The report outlines basically Kessler's difference of opinion as to what should have been done in conducting an investigation into the victim's death in this case. A difference of opinion among expert witnesses is insufficient to grant a motion for a new trial. *Commonwealth v. Lo*, 428 Mass. 45, 53 (1998); *Commonwealth v. Ramirez*, 416 Mass. 41, 47 (1993). Kessler's allegations are no longer viable for the defendant to use and he is now attempting to find support in other ways.

This case is however, similar to *Commonwealth v. Sena*, 441 Mass. 822 (2004). In *Sena*, at 831-832, the defendant sought post-trial to attack the Commonwealth's expert witness using a consent order restricting the expert witness's practice. The Supreme Judicial Court rejected the claim that the consent order was newly discovered, or that it would cast real doubt on the justice of the conviction. It is well established that newly discovered evidence that tends merely to impeach the credibility of a witness will not ordinarily be the basis of a new trial. *Sena*, *supra* at 831 (further citations omitted).

Discovery is not appropriate in this case, because the defendant has not presented the court with specific, non-hearsay, admissible allegations that show reason to believe that the defendant may, if the facts are fully developed,

be able to demonstrate that he is entitled to relief, *Daniels, supra* at 407.

C. The information sought is not within the custody and control of the District Attorney's Office or the police involved in the investigation.

The defendant's request is not merely an expansion of the previously allowed discovery order. In the earlier request, the defendant sought to inspect evidence that was admitted at trial.

In his new request, he seeks personnel records of a witness not affiliated with the District Attorney's Office or any law enforcement agency involved in the investigation of the case. These records may or may not be privileged or available pursuant to a public records request (G.L. c. 66, §10 and G.L. c. 4, §7, cl. 26). The defendant has made no attempt to apply directly to OCME for the records, but instead has gone straight to court.

The defendant cannot use a court order to compel the Commonwealth to search for records not within its custody and control. See *Wanis, supra* at 643, and *Commonwealth v Beal*, 429 Mass. 530 (1999).

D. Waiver

The defendant received the special plenary review pursuant to G.L. c. 278, §33E, reserved for first degree

murder cases. In addition, the defendant has also had two motions for new trial denied by both the Superior Court and the Supreme Judicial Court.

In his first motion for a new trial, which was consolidated with his main appeal, the defendant claimed ineffective assistance of trial counsel. *Snell, supra* at 779-780. In his direct appeal the defendant has already raised the issues that the victim may have died of natural causes, and that the medical examiner failed to conduct tests on an inhaler found by the victim. See *Snell, supra* at 770. All claims were rejected by the Supreme Judicial Court in its opinion.

The jury rejected the defendant's claim that the victim died of natural causes. The Supreme Judicial Court rejected the defendant's claim that the victim died of natural causes. In addition, in its opinion, the Supreme Judicial Court noted that on appeal that the evidence included testimony that the victim had suffered "17 injuries to her body that were inflicted contemporaneously or within minutes of the time of her death." *Snell, supra* at 769.

In his second motion for a new trial, among the defendant's claims was one that the victim's death was not caused by natural causes, but he instead claimed that

46579

someone else was the murderer. The defendant's second motion for a new trial again raised issues that had already been rejected by the Supreme Judicial Court in its opinion.

The defendant in his discovery request acknowledges that this information is not newly discovered.

A motion for a new trial may not be used to compel the review of issues on which the defendant has already had appellate review or issues on which the defendant has foregone the opportunity. *Commonwealth v. Balliro*, 437 Mass. 163, 166 (2002). All grounds for relief claimed by a defendant under rule 30 shall be raised by the defendant in his original or amended motion. Any grounds not so raised are waived unless the judge in his discretion permits them to be raised in a subsequent motion, or unless such grounds could not reasonably have been raised in the original or amended motion. *Balliro*, *supra* at 166, quoting *Mass.R.Crim.P. 30(c)(2)*.

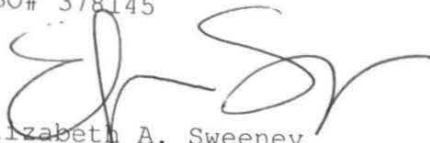
This court should consider the issue of waiver in ruling on this request for discovery. The defendant wishes to go through Dr. Zane's personnel records in order to potentially craft a third motion for a new trial, this is a fishing expedition, and is a fourth attempt overall to overturn his conviction.

579

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court reverse its order allowing the defendant's motion for discovery, and deny the defendant's motion for discovery.

Respectfully submitted,
Michael D. O'Keefe
District Attorney
BBO# 378145



Elizabeth A. Sweeney
Assistant District Attorney
BBO# 550378
Cape and Islands District
3231 Main Street
P.O. Box 455
Barnstable, MA 02630
(508) 362-8113

Eric B. Hogberg
General Counsel
Office of the Chief Medical
Examiner
Commonwealth of Massachusetts
BBO# 684242
720 Albany Street
Boston MA 02118
857-377-2245

June 27, 2018